STATE OF MICHIGAN

SUPREME COURT

Appeal from the Michigan Court Of Appeals
(Neff, P.J., and Talbot and J.B. Sullivan, JJ)

ALLAN PEDEN,

Plaintiff-Appellee

v

CITY OF DETROIT,
DETROIT POLICE DEPARTMENT

Defendant-Appellant.

_____/

Supreme Court No. 119408

Court of Appeals Docket
No. 214491

Wayne County Circuit Court
No. 96-645449-CZ

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The jurisdictional summary stated in the Appellant's brief is complete and correct.

QUESTIONS PRESENTED FOR REVIEW

Appellee accepts the Appellant's Statement of Questions Involved.

STANDARD OF REVIEW

Appellee disputes that the standard of review stated by Appellant is correct. Based on the questions presented by Defendant-Appellant for review, the legal sufficiency of the claim is not at issue. MCR 2.116(C)(8). The trial court summarily disposed of Plaintifff-Appellee's claim on the basis of MCR 2.116(C)(10). The Court of Appeals reversed finding genuine issues of material fact. In reviewing this matter, it cannot be understated that the burden of proof on the alleged "essential functions" of the job is on Defendant-Appellant. *Monette v Electronic Data Systems Corp.*, 90 F3d 1173, 1184 (CA 6, 1996). This Court conducts a de novo review of pleadings, depositions, affidavits, admissions, and other documentary evidence in a light most favorable to Plaintiff-Appellee to determine whether there is a genuine issue of material fact.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that determination of what constitutes the essential functions of a job is a fact specific inquiry into the actual duties of Plaintiff-Appellee's regular, permanent position in Crime Analysis. It is uncontroverted that (1) Defendant-Appellant twice analyzed these duties and deemed Plaintiff-Appellee qualified to perform this job; (2) Plaintiff-Appellee's job performance was rated as outstanding by his superiors; (3) while on restricted duty, Plaintiff-Appellee performed the duties of various permanent full duty positions; (4) Plaintiff-Appellee never requested or received a "light duty assignment;" (5) except for firearm qualification, Defendant-Appellant does not test the ability to perform the functions it claims are essential; (6) Defendant-Appellant does not require its non-disabled officers to meet specific physical agility standards; and (7) Defendant-Appellant's independent medical examiner's opined that Plaintiff-Appellee "*could do any kind of work that he wanted to do.*"

The ADA and PWDCRA make it unlawful to impose a physical agility standard on individuals with disabilities if the same standard is not imposed on non-disabled individuals. The ADA and PWDCRA was violated because employment termination was based solely on the employer's subjective perception that heart disease precludes Plaintiff-Appellee from continuing as a police officer without regard to his service record and actual job performance and using criteria not uniformly applied to all of its employees.

In light of the foregoing, genuine issues of material fact exist with respect to the essential functions of Peden's former position and whether Peden can perform those duties.

COUNTER-STATEMENT OF FACTS

Peden was working as the 13th Precinct's "A Clerk" when he suffered his February 8, 1986 heart attack. App 111a. On May 21, 1986, Appellant's physician, Dr. Gerisch, physically examined Peden and described him as being in general good health. Dr. Gerisch authored a report stating; *"I think it is good treatment for him to be working right along. I think he could do*

any kind of work that he wanted to do." App 154a. Notwithstanding the opinion, Appellant listed Peden as being on "permanent" restricted duty. App 117a. After every review during the 10 years following the heart attack, Appellant's physicians concluded Peden was "able to work with restrictions." App 117a, 119a, 120a, 121a. Even after claiming he was not able to peform the "essential functions" of a police officer, Appellant's physicians continued to indicate he was able to work with restrictions. App 78b, 79b. None of the physician's specifically described the restrictions. Appellant did not specifically described the restrictions.

Peden's employment was terminated October 18, 1996 not August 22, 1997. Peden performed all of the duties of his various positions and all those requested or required of him since he was diagnosed as having heart disease ten years earlier. App 83b.

Appellant has several positions it considers "restricted duty positions." The Collective Bargaining Agreement lists several positions that are usually staffed by "long term limited duty" employees. App 86b. Peden never requested, applied for or worked in a such a position. He held two regular, full duty, positions following his heart attack. The first position was that of the 13th Precinct's "A Clerk;" the position in which he was working when he suffered the heart attack. He applied for, and was permanently assigned the position in accordance with Appellant's standard personnel policies; that is, he was the most senior qualified person seeking the job without regard to his being on restricted duty status.

While classified as restricted duty and prior to his transfer to headquarters, Peden was nominated for Police Officer Of the Month. In his nomination, Peden's supervisor wrote; *"Officer Peden has made arrests while working the desk for Attempted Murder, Felonious Assault, and for persons wanted on warrants.... [Peden] is greatly admired by his peers as well as his supervisors."* App 6b. He was also given a Merit Award for chasing and apprehending a robbery suspect while he was off duty. The Report of Meritorious Service (App 8b) describes how Peden, while traveling to work, observed a twenty year old male running with a woman's purse. This

suspect was being chased by two other men. Peden attempted to block the suspect with his car but when that failed *gave chase to the suspect on foot*. Peden caught the suspect, tied the suspect with shoelaces, and transported the suspect to the Precinct in the back seat of his car.[1]

In August, 1993, Peden applied for a transfer to the Crime Analysis Unit where he could regularly work with computers. After an interview, the commander of the Crime Analysis Unit approved the transfer without regard to the medical condition or restricted duty status. App 11b. After working in the section on a temporary reassignment, his supervisor requested the transfer be made permanent. App. 13b. In both the "A Clerk" and Crime Analysis positions, Peden's Performance Evaluation ratings were the highest expected of a police officer.[2] App 67b, 14b-55b.

Appellant admitted that "Peden's position was won through contractual bidding."[3] Peden's 'restricted duty status' did not disqualify him from these positions, nor did it result in his being given preferential consideration. He was performing the same duties that individuals on "full duty status" would perform.[4]

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[1] These are not the "bald assertions" by Peden as Appellant argues. These are excerpts from Appellant's business records and authored by Peden's supervisors.

[2] Inspector Barbara Weide explains that while performance ratings do go "up to a hundred," as a practical matter a rating of 90 would be the highest an officer can achieve. App 67b.

[3] App 56b; 57b. The significance of this admission is highlighted by Appellant's distinguishing *Dorris v City of Kentwood,* 1994 WL 762219 (WD Mich 10/4/94) in a case brought by other Detroit officers who requested and were assigned, light duty jobs. "It is highly relevant that both officers in [the Tower] case are patrol officers who unlike Officer Dorris, did not obtain a D.A.R.E. - like non-patrol job through their union contract bidding procedures." Page 29, Appellant's Brief In Support Of Motion For Summary Judgment, *Tower, et al. v City of Detroit Police Department*; E.D. Mich #96-72369. The *Dorris* analysis should control the outcome of this case since Peden was in a position, which like the D.A.R.E. position did not require regular strenuous physical activity.

[4] Appellant's affidavits by CAU co-workers indicate that Peden did not work special events because of restricted duty status. Peden never told Appellant he could not work the special events. There is no medical opinion that he could not work the special events. Finally, these affidavits do not come from Peden's superiors who were in a position to assign him to the special events. Peden's supervisors have not indicated that their failure to assign Peden to special events created any particular problems.

Appellant admits that none of its police officers are required to meet in-service physical agility standards. Further, its does not require any minimum level of proficiency in performing the alleged "essential functions" list. App 70b-71b, App 63b.[5] Appellant does not have a policy with respect to the maximum length of time an individual may be classified as "restricted duty." It accommodates individuals with medical restrictions when this is in Appellant's financial interest.[6]

Without any prior warning, notice, consultation, or discussion, Peden was notified Appellant initiated an involuntary retirement application against him. His last day of work was October 18, 1996 not August 22, 1997.[7] It was only through discovery Peden learned that the application was signed by George Hill, the Department Physician. Chief McKinnon's signature is not on the application. App 134a. Dr. Hill's qualifications are unknown. Certain negative information contained in Dr. Gerisch's medical report is quoted by Dr. Hill. App 128a. Dr. Hill omitted Dr. Gerisch's opinion that *"I think it is good treatment for him to be working right along. I think he could do any kind of work that he wanted to do."* App 154a. Dr. Hill also omitted the conclusion that the heart attack was "duty connected injury" as contained in Peden's personnel record. App 5b. Dr. Hill never examined Peden and he does not specifically state what Peden

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[5] App 70b-71b Falvo Tr. 98:25 to 101:12. App 63b; Weide Tr 20:1-25.

[6] Commander Falvo, an attorney in charge of labor relations, testified; "if we are responsible for paying their entire salary and they are able to do something consistent with their medical problem that we can get productive work out of them, we are quite insistent that they show for the restricted duty " App 68b. Falvo Tr 18:24 to 19:4.

[7] The Appendix to part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act; (29 CFR 1630) instruct an employer that compliance with the ADA requires the "individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, 'individual assessment' means analyzing the actual job duties. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform. After assessing the relevant job, the employer, *in consultation with the individual*, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions."

is unable to do. The Detroit City Charter permits an involuntary retirement only when an employee is "totally incapacitated." App 97a, Detroit City Charter, Chapter VII, Article VIA, §3. "Total incapacity" is not defined by the Charter or by Defendant-Appellant's regulations.

After explaining a police officer needs to be healthy enough to "attempt" to perform these tasks, Inspector Weide could not identify who reviewed this task list[8] as it pertained to Peden. She could only state that it was her guess that Peden's private physician required him to work indoors.[9] She deemed his actual performance of duties to be unimportant.

> A. That they're[10] healthy enough to work full duty.
>
> Q. Well, okay. And, this is what I'm getting at. Because the city, if I'm – against, I'm not trying to put words in your mouth, but I understand that the city says, to be full duty you got to be able to do all these twenty-four items?
>
> A. Yes.
>
> Q. Whether or not you actually do them on the job is something different?
>
> A. Right. It's unimportant.
>
> Q. Unimportant. Okay. To you. But you've got to be able to do them.
>
> A. Yes.
>
> Q. So you've got to be able to effect a forcible arrest?
>
> A. Yes.
>
> Q. Okay. So your seventy-one year old man has to be able to tackle somebody?
>
> A. Make an attempt to arrest the person, yes.
>
> Q. Make an attempt to arrest them.
>
> A. He doesn't necessarily succeed, does he?

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[8] Appellant continues to refer to its alleged "essential functions" as MLEOTC Standards. MCOLES, the state agency which developed the task list does not described it as a "standard."

[9] Inspector Weide is in charge of the police department's medical section. This unit prepares and submits the involuntary retirement applications.

[10] The examination concerned two officers ages 77 and 78, App 58b, 59b.

Q. He doesn't fail and get kicked out?

A. A twenty year old might not succeed either.

Q. Okay. But he has to be able to try?

A. Yeah. He has to be able to try.

Q. All right. Now, what have you seen in the file that says Al Peden could not try to make an arrest?

A. His statements from his private treating doctor.

Q. Which said that he can't make an arrest?

A. That he cannot go out on the street. He has to be confined to an inside job.

Q. His private treating doctor said he had to be confined to an inside job?

A. That he had to work limited duty, which is inside work.

Q. What did his doctor actually say? Did he say he had to work inside or did he say he should be on light duty? I mean, which?

A. Well, let me look at some of these notes.

Q. Sure.

A. Yours are probably not in the same order as mine, are they. You probably put yours in proper order.

Q. That' how I got it from your counsel.

A. Okay. Here's one that says he has to have restricted duty, indefinite restricted duty.

Q. Okay. Now what is restricted duty?

A. Inside work. No uniform. Inside office. And then in some cases restricted might even be more definitive, like, no lifting, no stairs, whatever. I mean, it can be – but usually – when we consider restricted duty, no uniform, inside work.

Q. Okay. Now did you ever ask his doctor, and that's Dr. Poling, I believe, you're referring to, how that doctor defined restricted duty?

A. I don't know if they did or not.

Q. Okay.

A. But the officers on the job, especially someone of this nature who has dealt with us for so many years, knows what restricted duty is.

Q. Who are you referring to now?

A. Mr. Peden. Officer Peden should know and any other officer who comes to the Medical Section and has to deal with this.

Q. Well, for example –

A. -- because we explain to them what it is.

Q. Let's, you know, again, it's a definitional thing. For example, I have a client who broke a tailbone and she worked as a clerk. She could not work because she could not sit down and she could not perform her job standing up. So, basically she would have had some restriction with respect to the duties she performed; right?

A. Yes.

Q. Only the opposite of everybody else. She couldn't sit whereas most people can't stand?

A. Correct.

Q. So it's a definitional issue. So I'm asking you if you ever inquired as to Dr. Poling's definition of how he used the term, restricted duty?

A. I personally did not.

Q. Did your department?

A. I can't tell you if they did or not.

Q. Okay. And the only thing you can tell me is that you guess they sent Exhibit 1 out to somebody, and it came back from somebody with certain items circled? That's all you can tell me; correct?

A. Right. Because this wasn't signed and the cover sheet's not there. So, I don't know who circled that.

Q. And you don't even know how it got in the file; correct?

A. Personally, no.

Q. Okay. Do you know who would?

A. Let's see. Possibly the case manager, but I really don't know that either.

Q. And the case manager would be?

> A. See, it depends when this was done because we've had a transition with manpower in the command. And if I knew when this was done, I would be able to tell you who was the case manager. But I don't know the date, so I don't know which one it was.
>
> App 64b, 65b, and 66b; Weide Tr Pg. 20-23.

Since Peden's termination, Appellant filled his position by removing an individual from patrol duties and assigning her to Crime Analysis. Appellant accommodates a second individual with medical restrictions who continues to work in Crime Analysis. Both individuals perform the identical work that Peden performed except that now restricted duty officers are assigned to special assignments. App 83b.[11]

At the time of Peden was forced into retirement, Appellant was understaffed. It was budgeted for more positions that it could fill. 76b, McKinnon Tr 37:19 to 39:18. It was funded for 4,072 police officers but only carried 3,950 on its force. App 75b, McKinnon Tr 32:2-22. It requested employees to delay their retirements. App 85b.[12] Finally, it sought to decrease disability retirements. App 149b.

Approximately half of the sworn personnel are assigned to positions staffing the precincts. Within the Precincts there are positions, such as "A-Clerk," that Peden is able to perform. The remaining fifty percent are assigned to various support staff functions and

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[11] Appellant finally admits that nothing in its policies prevent an officer on restricted duty from taking police action needed. Defendant-Appellant's Brief On Appeal, pg 37.

[12] The trial court stated that Appellant's business reason was to reduce the number of police officers. Appellant actually argued it needed more officers capable of performing the functions it claims are 'essential' because it needed more officers assigned to patrol duties. In discrimination cases, a question of fact exists where a proffered business reason is rebutted by contradictory evidence. *Lytle v Malady*, 458 Mich 153, 579 NW2d 906 (1998). Peden contends that (1) removing an officer from patrol duties to fill Peden's Crime Analysis position, (2) operating below budgeted strength, (3) the admitted difficulty recruiting personnel, (4) the failure to re-deploy staff personnel to street patrols, (5) the request to delay retirements and recruit, (6) the abrupt change in Appellant's restricted duty policy, (7) the decision to claim that the MCOLES task list is the Appellant's definition of "essential functions," (8) the lack of any specific physical agility standard, and (9) the failure to specifically identify which tasks Appellant claims Peden is not able to perform demonstrate the existence of a factual dispute and that Appellant's stated business reason is a pretext.

specialty units. The Police Manual, App sets forth the functions of specific units in considerable detail. For example, the functions of the Crime Analysis Unit are described (App 110b) as:

> The Crime Analysis Unit of the Information Systems Section is responsible for the following:
>
> a) Monitoring and analyzing crime data, preparing "photo-fit" composites of suspects, maintaining and updating modus operandi information on selected criminal activity, and forecasting probable crime patterns based upon an analysis of reported incidents;
>
> b) Maintaining liaison with various commands of the department, supplying current information to delineate specific areas of criminal activity with supportive information to enable the efficient deployment of resources;
>
> c) Issuing circulars and surveillance proposal information to the appropriate commands after analyzing data related to selected crimes; and
>
> d) Developing an up-to-date, automated information system which can be applied to the solution of specific crime problems.

Appellant acknowledges many of its officers are not required to perform traditional police functions.

> A. What do you mean by police functions?
>
> Q. Do you have an understanding of the term police functions?
>
> A. I do. I just want to make sure we're on the same –
>
> Q. Okay. Why don't you tell me what your understanding is, and then you can answer the question in light of your understanding.
>
> A. I'm going to assume that you're talking about whether there are police officers making arrests or dealing with the citizens out on the street when they have a complaint. And if that's what you mean by police function, then the officers in my command do not do that function for the department.
>
> Q. And how many individuals are in your command?
>
> A. There are nineteen people including two secretaries. So, seventeen police officers and two civilians.
>
> Q. And the seventeen police officers basically don't perform any police functions is that –
>
> A. They don't go out on the street and make arrests as part of their daily duties, no.

Q. Okay. Are there other units within the Detroit Police Department that are similar in nature, in that police officers are assigned duties that do not involve going out on the street and making arrests?

A. There are other similar administrative type units, yes.

Q. And, could you describe some of those unit for me?

A. The law department. They represent the city in lawsuits and at depositions and things of that nature. They don't – their daily assignment isn't to go out on the street and make arrests as a routine. What else is there? There's a Forfeiture Unit in the department and they process evidence brought in by the street people. They normally don't go out and make arrests, but someone's got to process the evidence and the property. The Property Unit itself. They have to process all the paperwork and all the evidence brought in and out by other officers.

Q. Okay. What about the Crime Analysis Unit, do you know if one exists in the department?

A. There is a Crime Analysis Unit, yes.

Q. And, what about the officers assigned to that unit?

A. And what about them.

Q. Do they perform police functions on a daily basis?

A. They're not required as a normal part of their routine to go out on the street and make an arrest or chase somebody or whatever or take a complaint from a citizen.

App 60b, 61b, Weide Tr 9-10.

As early as 1988, Appellant's physician classified Peden as "permanent restricted duty status." App 117a.

ARGUMENT

Peden's forced retirement violated the Americans With Disabilities Act (ADA), 42 USC 12101, *et seq.*, and the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq.* MSA 3.550(101), *et seq.* Both statutes make it unlawful for Appellant to take an adverse employment action against Peden because of his heart disease unless that disability prevents him from performing the essential functions of his job (as stated in the ADA) or is related to his

ability to perform the duties of his particular job (as stated in PWDCRA). 42 USC 12112(a), provides:

> (a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 USC 12111(8) defines "qualified individual with a disability" as:

> The term qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Section 202(1) of the PWDCRA, MCL 37.1202(1), MSA 3.550(202)(1) states:

> (1) An employer shall not:
>
> > (a) Fail or refuse to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
> >
> > (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
> >
> > (c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
> >
> > (d) Fail or refuse to hire, recruit, or promote an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.
> >
> > (e) Discharge or take other discriminatory action against an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.
> >
> > (f) Fail or refuse to hire, recruit, or promote an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

(g) Discharge or take other discriminatory action against an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

A plaintiff establishes a prima facie case of unlawful discrimination by proving that (1) he is a handicapped person within the meaning of the Act; (2) he is otherwise qualified for the position; and (3) he was discharged from the position solely by reason of his handicap. Since Appellant has not specifically identified which duties it claims Peden could not perform, it failed to satisfy its burden of proof. The trial court erred when it ruled the employer's determination on this issue is conclusive. "Once a plaintiff-employee has established a prima facie case of discrimination, the burden of proof shifts to the defendant-employer to rebut the inference that the handicap was improperly taken into account, by demonstrating that the handicap is relevant to the job qualifications." *Kuntz v City of New Haven*, 1993 WL 276945 (D Conn 3/3/93); citing *Teahan v Metro-North Commuter Railroad*, 951 F2d 511, 515 (2d Cir 1991), cert. denied, 113 SCt 54 (1992).

I. The Court of Appeals Correctly Found That The ADA And PWDCRA Require A Factual Inquiry Into The Actual Duties Of The Employment Position In Dispute. Appellant's Definition Of Essential Functions Is Not Conclusive.

Both the ADA and PWDCRA apply to Appellant. Under the PWDCRA, an employer is defined as a person MCL 37.1201(b), MSA 3.550(201)(b), and a person is defined as including a governmental agency. MCL 37.103(h), MSA 3.550(103)(h). The trial court's conclusion that these statutes were not meant to restrict a municipal employer's discretion is wrong. The Court of Appeals correctly found that the trial court failed to make a fact specific inquiry into the "essential functions" of Peden's job. App 66a. As stated by Judge Reinhardt in *Cripe v City of San Jose*, 261 F. 3d 877, 881 (9th Cir. 2001); the "ADA does not contemplate that the disabled must be integrated only into the workplaces in which the work to be performed is unimportant –

it requires every type of employer find ways to bring the disabled into its ranks, even when doing so imposes some costs and burdens."

In determining whether a job requirement is an "essential function," "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 USC 12111(8). However, such evidence is not conclusive. "An employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description." *Echazabal v Chevron USA, Inc.*, 226 F. 3d 1063, 1071 (9th Cir. 2000).

Not one case cited by Appellant retreats from these principles. Not one court has given a police department unlimited discretion as to how best to fight crime. In each case cited by Appellant concerning law enforcement officers, the court made a fact specific inquiry into the job duties of the particular position.

A. The Court Must Look Behind Appellant's Pronouncements And Determine How It Has, In Fact, Organized Its Department.

For ten years Peden satisfactorily performed his job to his supervisors' expectations. Until 1995, Appellant maintained employees in the restricted duty status so long as they were able to perform the duties of the position they held within the Department. Even today, Appellant will accommodate individuals if it is in their financial interest.

In addressing this precise issue the United States Supreme Court, in *School Board Of Nassau County v Arline*, 480 US 273, 287 (1987) stated:

> To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

Similarly, the Sixth Circuit held that "whether physical qualifications are essential functions of a job requires the court to engage in a highly fact-specific inquiry --- Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." *Hall v United States Postal Service*, 857 F2d 1073, 1079 (6th Cir 1988). "The interpretive guide to Part 1630 of the regulations makes it clear that the inquiry into whether a particular function is essential is a fact specific exercise to be made on a case by case basis. 29 CFR Part 1630 App. At 400." *Sharp v Abate*, 887 F Supp 695, 697 (1995).

Appellant's past practices and departmental organization establishes that there are varied functions within the Detroit Police Department, some of which require agility and physical exertion, and some of which do not. In large metropolitan police departments there are numerous jobs that can be performed by disabled individuals. *Rehling v City of Chicago,* 207 F. 3d 1009 (7th Cir. 2000).

B. The Duties Of The Position Held By Peden In Crime Analysis Must Be Examined In Light Of All The Evidence. Federal Regulations Illustrate Several Types Of Evidence In Determining The Essential Functions Of The Job.

The federal regulations define the term, "essential functions," and list the types of evidence a court should consider. 29 CFR 1630.2(n) states:

> Essential functions. -- (1) In general. The term "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
>
> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so

that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

While less extensive than its federal counterpart, PWDCRA, MCL 37.1103 (l), MSA 3.550(103)(l), states: "'Unrelated to the individual's ability' means, with or without accommodation, an individual's handicap does not prevent the individual from doing 1 or more of the following: (i) For purposes of article 2, performing the duties of a particular job or position."

Both federal and state law require focus on the ability to do a particular job. The duties of a particular job are not determined solely by reference to the employer's definition. *Adkerson v MK-Ferguson Co*, 191 Mich App 129, 140-141, 477 NW2d 465 (1991); *Szymczak v American Seating Co.,* 204 Mich App 255, 514 NW 2d 251 (1994). Peden's employment position is the position he held in the Crime Analysis Unit. His ability to perform the Crime Analysis' job is the relevant inquiry. *Dorris v City of Kentwood,* 1994 WL 762219 (WD Mich 10/4/94); *Kuntz v City of New Haven*, 1993 WL 276945 (D. Conn. 3/3/93), *aff* 29 F3d 622, (2nd Cir 1993), *cert. den.*, 513 US 1058, 115 SCt 667 (1994); *Sharp v Abate*, 887 F Supp 695 (SDNY 1995); *Simon v St. Louis County*, 656 F2d 316 (8th Cir 1981); *Stone v City of Mount Vernon*, 118 F3d 92 (2nd Cir 1997); *Cripe v City of San Jose*, 261 F. 3d 877, 881 (9th Cir. 2001). This Court, albeit in a different context, stated: "[f]or the following reasons we conclude the Legislature intended that the existence of a handicap be determined with reference to the job actually held or applied for by HCRA claimants." *Rourk v Oakwood Hospital Corp*, 458 Mich 25; 580 NW2d 397 (1998).

"It is the nature of the work, not the classification, which should determine an employee's 'employment position' for purposes of enforcing the Act." *Valdez v Albuquerque Schools*, 875 F Supp 740 (DC NM 1994). "Before addressing the essential functions of the position, the court must first determine what the employment position is." "Although the city has presented evidence suggesting that, due to the small size of its police department, Dorris could be called upon to perform patrol duties, Dorris' evidence showing that he was not called upon to perform as a patrol officer raises a genuine issue of material fact sufficient to warrant denial of summary judgment." *Dorris v City of Kentwood*, 1994 WL 762219, (WD Mich 1994). "Genuine issues of fact exists as to whether fire suppression was essential function of position in certain of fire department's specialized bureaus and whether department could reasonably accommodate paraplegic firefighter's disability." *Stone v City of Mount Vernon*, 118 F3d 92, (2nd Cir 1997). "Defendants' argument presupposes that the job at issue is "correction officer" whereas the term and civil service classification 'correction officer' may include within it a number of different jobs – just as the term 'soldier' includes not only riflemen, but butchers, bakers and, perhaps in former times, candlestick makers." *Sharpe v Abate*, 887 F Supp 695, 698 (1995).

In reversing defendant's judgment in *Simon v St. Louis County*, 656 F2d 316 (8th Cir 1981); the court described the analytical framework in reaching a conclusion whether an individual may or may not be able to perform the duties of a police officer. After reviewing all evidence introduced at trial the appellate court concluded the defendant did not meet its burden in showing that plaintiff was required to perform all the duties defendant claimed were essential. Plaintiff ultimately lost the case after the second trial on the basis of the defendant's evidence that he could not make a forcible arrest and that it had a uniformly applied job rotation policy which would have resulted in plaintiff being in a position where he would regularly be called upon to make arrests. *Simon v St. Louis County*, 735 F2d 1082 (8th Cir 1984). In this Peden's

case, there is no job rotation policy. In the last ten years of his employment while on restricted duty status, he was not rotated out of the positions he held.

Simon was decided on the actual functioning of the position held by plaintiff and evidence with that plaintiff could not effect a forcible arrest. It was not decided based on a subjective opinion that in the employer's view the work could not "accommodate the plaintiff's physical condition." Only an assessment of the evidence as to the duties and the individual's abilities avoids decisions based on "blanket exclusions." In *Stone, id* at 98, the Second Circuit stated the appropriate inquiry:

> We in no way suggest that the essential duties of a firefighter do not normally include fighting fires. However, a proper analysis of a claim under the federal disability statutes, must be focused on the 'fundamental job duties of the employment position the individual with a disability ... desires," 29 CFR 1630.2(n)(1) (emphasis added), rather than solely on the title held by the person occupying that position or other positions occupied by most persons holding that title. The court should have focused more closely on the job duties of firefighters assigned to the FAB or FPB.

In Peden's case, the head of the Appellant's medical section admitted that Peden was "not required as a normal part of their routine to go out on the street and make an arrest or chase somebody or whatever." App 61b. The Sixth Circuit repeatedly holds that it is the actual functioning of the job at issue that determines the essential functions. *Hamlin v. Charter Township of Flint,* 165 F. 3d 426 (6th Cir. 1999). Similarly, in *Kuntz*, the court stated:

> The facts in Simon are markedly different from those presented here. First, the plaintiff in Simon was unable to perform even the most basic functions of a police officer; in contrast here, plaintiff has performed, and is continuing to perform, virtually all activities, except for 'high end' physical exertion.

In this case, the trial court erred by acquiescing in the employer's opinion and not allowing a trier of fact to objectively evaluate the evidence. It gives undue weight to one type of evidence to the exclusion of the other evidence. Historically, the jury decides the weight to be given to evidence. *Swanks v Washington Metropolitan Area Transit Authority,* 116 F3d 582 (DC Cir 1997). The trial court deliberately and wrongly decided that it was not going to "focus" on

the "actual work" and erroneously ruled that the employer should have the limitless discretion to determine whether or not it would accommodate plaintiff's condition. Even cases cited by Appellant do not support this trial court's conclusion.[13] These courts reached their conclusion on the basis that the particular plaintiff could not perform a particular task; such as, seeing, arresting, shooting, or walking. These tasks were found by the respective courts to be essential to the position the plaintiff sought or desired. Each court found plaintiff could not perform those tasks. Some Courts, like *Davoll v Webb*, 194 F. 3d 1116, 1126 (10th Cir. 1999), found that not all positions within the Denver Police Department (DPD) require the ability to shoot a gun or effect a forcible arrest.[14]

Peden acknowledges that, except in rare cases, Appellant has required its officers to be proficient in shooting a gun. Regular tests having specific standards are given to all officers to monitor their ability in this regard. There are no tests or minimum standards governing the other items on Appellant's task list. In fact, some of the items are completely vague. For example, Appellant claims that it is essential an officer have the ability to "climb over obstacles." Without knowing the height of the obstacle or how quickly it must be climbed, there is no way to determine whether most persons could perform the task. An individual's ability could only be evaluated in the extreme case where the disability prevents climbing any height.

By using deliberately vague descriptions, Appellant creates a situation where a restricted duty officer could never pass and a full duty officer could never fail. As Inspector Weide explained, an officer is only required to "attempt" performance of the alleged "essential

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[13] For example, in *Champ v Baltimore County*, 884 F Supp 991, 995 (1995), the court stated; "A blanket exclusion of all disabled police officers clearly constitutes unlawful discrimination on the basis of disability because it is based on generalizations or stereotypes about the effects of a particular disability on an individual."

[14] Appellant cites *Coski v. City and County of Denver*, 795 P.2d 1364 (Colo App 1990) for the proposition that functions cannot be waived. The continued validity of this case and Denver's policies have not withstood the test of time. After Davoll commenced his case, the United States Justice Department successfully obtained a injunction prohibiting Denver's unlawful actions. *United States v City & County of Denver,* 943 F Supp 1304 (1996).

function." App 64b. Appellant presumes that an officer classified as restricted duty cannot perform or attempt to perform any of these tasks. In other words, Appellant infers that restricted duty means something that it may not. Appellant does not even inquire as to what restrictions are imposed. It applies a "blanket" definition. "Blanket exclusions" are no longer viable. *Kapche v City of San Antonio*, 176 F. 3d 840 (5th Cir. 1999); *Kapche v City of San Antonio,* 304 F. 3d 493 (5th Cir. 2002).

C. The Evidence In This Case Creates A Question Of Fact As To The Essential Functions Of The Position.

In viewing the types of evidence set forth in the federal regulations, 29 CFR 1630.2(n)(3) in the light most favorable to Peden, there is clearly a genuine issue of material of fact as to what constitutes the essential functions of Peden's position.

1. The Employer's Judgment As To Essential Functions

For purposes of this factor, Appellant's judgment should be based on objective standards; not Appellant's assertion made solely for the purpose of litigation. Concluding that the Appellant deems the twenty-four tasks on its list are essential to all positions within its department, ignores the fact Appellant has not uniformly applied this list to all officers. Appellant's own Collective Bargaining Agreement describes certain units which are usually staffed by employees designated as being on "long term limited duty status." App 86b. The same provision acknowledges "regular positions" having duties which can be performed by individuals with disabilities. Appellant does not have specific criteria or testing by which a person can be judged to meet these vague standards. Appellant admits that its police officers are not required to perform the items on the list with any minimum proficiency. Appellant admits it does not require any of its officers to meet these standards through periodic testing. Appellant admits that when it is in its financial interest to employ a person who cannot perform all the functions, that person's employment is continued. Even where a person admittedly cannot perform these alleged essential functions, they will be employed if Appellant chooses to ignore the disability and

keep them employed. Appellant's standard performance evaluations do not include references to any measure of physical agility. An officer with medical restrictions continues to be employed in the Crime Analysis unit.

Regardless of Appellant's contention, an objective review of the facts show Appellant did not deem the tasks on the list to be essential in all positions, including those in the Crime Analysis Unit.

2. Written Job Descriptions

Appellant's job description was adopted in 1974; two years after Peden was hired. Even so, the description acknowledges that police officers are responsible for performing a variety of duties related to crime prevention and law enforcement, including clerical and administrative duties. Appellant organized its department into eighty-three separate units, specifically describing the function of each of these organizational units in detail. Except for some patrol positions, none of the functions performed by the other units require performance of the tasks on Appellant's list. Appellant admits many of these units, including the Crime Analysis Unit, are staffed by officers who do not perform those tasks. Both Inspector Weide and Commander Falvo readily admit that there are a number of units within the department that do not perform the alleged 'essential functions' as part of their daily routine. In looking at the objective evidence, a jury could reasonably conclude the tasks on the list are not 'essential' to all positions within the department.

3. Amount Of Time The Employee Must Spend Performing The Function

Appellant's large metropolitan police force is organized into both patrol and support staff positions. App 87b-148b. Those individuals assigned to support staff are not routinely called upon to make arrests, become involved in car chases, or shoot a gun. Appellant admits that the frequency with which the alleged essential functions are performed depends on the employee's position. Often these functions are never performed in certain positions. Peden was able to

perform all of the functions as frequently as he was required to perform them in any of his positions since 1986. While in Crime Analysis, he was not called upon to perform any of the functions on the list. When assigned to the 13th Precinct, he was and he did.

This factor is particularly important in Peden's case. He may not be able to withstand the rigors of a permanent street patrol position or the extremely physical positions in the Special Response Team (SWAT) but he was able to be a physical as necessary for the position he holds.

4. Consequences Of Not Requiring The Incumbent To Perform The Function

Appellant has not cited one instance in which dire consequences resulted from Peden working in the Crime Analysis Unit. Since Appellant does not hold any of its officers to any minimum degree of proficiency in performing the alleged functions, they cannot claim Peden's alleged inability to perform results in any particular consequence. Nothing other than Appellant's own decisions prohibit deployment of restricted duty officers in emergency situations. Since Peden's forced retirement, officers on "restricted duty status" were mobilized for July, 1997 storm and are assigned to the special events. For the first time, Appellant admits that nothing in its policies prevent an officer on restricted duty from taking police action if needed. *Defendant-Appellant's Brief On Appeal*, pg 37. This admission squarely contradicts Appellant's contention that restricted duty equates with being unable to perform the "essential functions" of the job. *Defendant-Appellant's Brief On Appeal*, pg 25. It does not follow that since being on restricted duty is different than full duty means an employee cannot perform an essential function.

5. The Terms Of A Collective Bargaining Agreement

The CBA acknowledges that there are positions in which individuals with disabilities may serve. 86b. It describes several of the department's units as being customarily staffed for individuals with disabilities. The CBA describes regular positions the duties of which may be

performed by officers with medical restrictions. Plaintiff was transferred to the position in Crime Analysis under the terms of the CBA. He could not be displaced by a less senior employee regardless of the restricted/full duty status. There is nothing in the CBA which prevents the employment of individuals with disabilities or making an accommodation for these individuals.

6. Work Experience Of Past Incumbents In The Job

Since Peden was the past incumbent in the position, his work experience and performance evaluations are clearly reflective on whether these functions are 'essential' to the position. Attempting an arrest may be essential to all police officers in all positions. Working overtime on special events is certainly not. Given the organization and size of the department, it may not be essential that minimum physical strength is required for all positions.

7. Current Work Experience Of Incumbents In Similar Jobs

The duties of the position have not been changed since Peden was terminated. In fact, Appellant determined that another individual classified "restricted duty status" whom Appellant contends cannot perform the tasks on the list continues to be employed in Crime Analysis. There is simply no basis for distinguishing how these tasks are essential when applied to Peden and not that essential when applied to the other officers in the same position. Appellant attempts to avoid this result by claiming its decisions are based on whether medical restrictions are temporary or permanent. Again, this is not substantiated by the facts. In 1988, Peden was classified as being on permanent restricted duty. Unlike other police departments, Appellant does not have any specific standard defining "temporary." It does not have any policy limiting the length of an individual may be on restricted duty. It does not have any policies as to what type of restrictions are accommodated and those that are not.

D. It Is Appellant's Burden Of Proof To Show That The Tasks On The List Are Essential. Inferences Should Be In Favor Of Plaintiff-Appellee. The Evidence Should Not Be Viewed In the Light Most Favorable To Appellant.

Employers often rely on disabilities when making employment decisions. They regularly discriminate based on disabilities. The distinction between lawful and unlawful discrimination can be based on objective evidence. "This disputed issue can be resolved by the introduction of direct, objective evidence concerning the disabled plaintiff's individual abilities to perform the essential functions of the job without reasonable accommodation, or whether a reasonable accommodation is possible." *Monette v Electronic Data Systems Corp.*, 90 F3d 1173, 1184 (CA 6, 1996). The Sixth Circuit explained:

> Similarly, if a disabled individual is challenging a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary. 42 U.S.C. Section(s) 12112(b)(6) provides guidance on this issue. That provision of the statute states that an employer discriminates within the meaning of the statute by:
>
> > using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.
>
> This language indicates that an employer bears the burden of proving that a particular hiring policy is "job-related" and "consistent with business necessity." Although this section of the statute expressly concerns only qualification standards, testing procedures, and selection criteria that tend to screen out disabled individuals, we believe its clear import dictates that employers bear the burden of proving that a challenged job requirement is job-related. We note again, however, that the disabled individual retains the burden of proving that he or she is qualified to perform the essential functions of the job absent the challenged job requirement.

Appellant inferred that certain tasks are essential to Peden's position without regard to the frequency and duration the tasks are performed; without regard to the proficiency at which the tasks are performed; without regard to the lack of testing procedures that objectively determine whether the tasks can be performed. This case highlights the importance of not

accepting Appellant's subjective conclusions. As explained in the next section, it is not reasonable for this Court to infer that Peden's heart disease prevents him from performing the essential duties of his position.

II. Peden Contends He Can Perform The Tasks Deemed Essential By Appellant To The Same Standard Appellant Requires Of Its 'Healthy' Employees.

Lack of specific standards bring to light the fallacy in Appellant's argument. Employees not classified as being on restricted duty are "presumed" to be able to perform the tasks on the list. Employees classified as being on restricted duty are presumed to be unable to perform those same tasks. When questioned, Appellant managers did not believe actual job performance was relevant. As Commander Falvo and Inspector Weide testified, all that is required is that employees "attempt" to perform the tasks. Commander Falvo acknowledges that there may be employees who cannot perform. He testified:

> I will concede that the ability to do tasks normally performed by police officers is a continuum from the super fit athletic person who can, you know, run a mile in three and a half minutes or something all the way down to people at the other end of the continuum.
>
> App 70b Falvo Tr 99:25 - 100:5.

Peden's service record is documentary evidence that he can perform physical tasks. He has made arrests. He qualified with a firearm. If the physical agility standard for individuals without disabilities is in fact no standard at all, then it is discriminatory to impose greater physical requirements on Peden. Non-disabled employees are not required to run at a certain speed or for a specific time. They are not required to lift definite weights. Appellant allows non-disabled employees to run at their own speed for as long as they can. Appellant simply requires that they "try."

This absence of specific parameters alone raises a question of fact. Ruling otherwise simply allows employers to make decisions based on disability rather than ability. Proper public policy is defined by Congress and the Michigan Legislature. Congress stated that it is in the

national interest "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" 42 USC 12101(b)(2). The law is based on an objective evaluation of the ability to perform specific job duties. If an employer refuses to use objective standards, then the employer should be willing to present its case to a jury. This will not lead to juries 'micro-managing' the police department or any other organization. It will lead managers to prevent decisions based on "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 USC 12101(a)(7).

A. The ADA And PWDCRA Require Individuals To Be Treated The Same Regardless Of Their Disabilities. Since Appellant Does Not Have Uniformly Applied Minimum Physical Agility Standards, It Cannot Terminate An Employee Based Solely On A Perception That A Disability Prevents Performance Of Undefined Physical Tasks; Especially Where These Physical Tasks Are Not Regularly Performed In The Position Held By The Employee.

Appellant uses the 24 item list only to justify the disability retirements. The list is not applied to individuals who are not disabled or who do not report a disability to the Appellant's medical section. Appellant does not expect its non-disabled employees to perform the tasks on the list with any minimum level of proficiency. Other than routine firearm qualification, Peden was never tested with respect to how well he could perform the remaining tasks on the list. In fact, the tasks themselves are vague and do not have specific guidelines on which one can be judged to be able to perform the tasks.

Federal regulations permit an employer to develop physical agility tests provided these tests are related to the position at issue and consistent with business necessity; provided these tests are uniformly applied. 29 CFR 1630.10 states:

> It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered

entity, is shown to be job-related for the position in question and is consistent with business necessity.

Appellant has not and does not desire to establish physical agility tests. It does not want to uniformly apply these tests to all individuals in its department. Appellant simply wants the Court to ratify its subjective opinion. Since Appellant does not uniformly apply its 'standards' to all of its employees, the task list is used only to screen out individuals with disabilities. Appellant's reliance on the task list, especially in light of the admission that there is no minimum standard that 'healthy' employees are required to meet, is nothing more that a pretext. It is employed more to discriminate than to advance a legitimate job requirement. 42 USC 12112(b)(6))

Typically there are two types of physical standards. Some exclude an entire class of individuals with disabilities. For example, no persons who have epilepsy, diabetes, or a heart or back condition is eligible for a job. The second standard is a measure of the physical ability needed to perform the job. For example, the person in the job must be able to lift 50 pounds for 8 hours daily. If the lifting requirement is job related and consistent with business necessity, then it will be upheld because the focus is on the ability, not on the disability. The blanket exclusion of an entire class of individuals with disabilities is unlawful because they are based on employer fears or assumptions, or that employment may cause higher medical insurance or workers' compensation costs, or may have a higher rate of absenteeism. The focus is on disability, not ability. In this case, Appellant did not evaluate Peden's ability. There is nothing in Dr. Hill's letter that indicates he reviewed Peden's service record. His opinion was unlawfully based solely on the disability. 42 USC 12112(b)(3)(A). *Holiday v City of Chattanooga,* 206 F. 3d 637 (6th Cir. 2000).

In *Holiday, id* the Sixth Circuit held in a failure to hire case brought under the ADA that an employer may not rely on perfunctory medical opinions in assessing whether an individual is or is not able to perform the essential duties of the job.

In *Lowe* v. *Alabama Power Co.*, 11 AD Cases (CA 11, 2001), the Eleventh Circuit followed *Holiday* and reversed the trial court's order granting summary disposition for the employer finding that the employer did not have a good faith belief that the plaintiff was unable to perform his position and posed a "direct threat to the safety of others" where the employer based its conclusion on a "cursory" physical examination performed by its physician one year prior to the adverse employment action. The court held that the employer has an obligation to base its decision on "particularized facts using the best available objective evidence." Medical opinions that are not supported by an individualized assessment, objective in scientific evidence are considered conclusory and not valid. The court stated:

> If an employer believes that a perceived disability inherently precludes successful performance of the essential functions of a job, with or without accommodation, the employer must be correct about the effected employee's ability to perform the job in order to avoid liability. There is no defense of reasonable mistake.

Appellant's argument that it could not administer a physical agility test to Peden is nonsense and without any support in the record. Not one physician opined that Peden could not take a physical agility test. If Appellant, in fact, had such a test and was concerned whether Peden participate in the test, Appellant could have had the test reviewed and Peden examined by a competent physician specializing in heart disease or occupational health and obtain an opinion whether he could participate in the test. The fact of the matter is that there is no test.

B. Peden's Successful Job Performance Over The Previous Ten Years Creates A Question Of Fact As To Whether He Can Perform The Essential Functions Of The Job.

It bears repeating that Peden successfully performed the duties of at least two full duty, regular permanent positions for ten years following his heart attack and being classified as restricted duty. No matter how the "essential functions' of those positions are defined, Peden performed them. Performance evaluations authored by his superiors do not reveal any shortcomings in his job performance. In his most recent position, his supervisor noted that as

crime analysis officer, Peden "goes to great length to produce quality work," and "handles large volumes of perplexing assignments with speed and accuracy." App 54b, 55b. None of his supervisors deemed his performance deficient in any way. None of his supervisors indicated he could not make a forcible arrest or shoot a firearm. Presumptions that irrebuttably determine that an individual is unqualified for a particular job are violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Cleveland Board of Education v. La Fleur,* 414 U.S. 632; 94 S.Ct. 791, 39 L.Ed.2d 52 (1974).

In *Holiday v City of Chattanooga,* 206 F. 3d 637, 643 (6th Cir. 2000), the Sixth Circuit explained:

> Indeed, the Supreme Court in a recent triad of cases has again made clear that such an individualized determination — one which focuses on the medical condition's actual effect on the specific plaintiff — lies at the heart of the ADA. *See Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2147 (1999).

The very fact Peden successfully performed the duties of his position raises a question of fact as to whether he can perform the essential functions of the job.

III. Peden Satisfied The Element Of Having A Disability Because He Has A Record Of Having A Disability And Is Regarded By Appellant As Being Totally Incapacitated.

The ADA sets forth three alternative tests a plaintiff must meet to satisfy the definition of disability. 42 USC 12102(2) of the ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

29 CFR 1630.2(h)(1) defines physical impairment as including "a physiological disorder, or condition, ... affecting one or more of the following body systems: ... cardiovascular." 29 CFR 1630.2(l) defines the phrase "regarded as having such an impairment" as:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

The most pertinent example of the "being regarded as" element is found in the Senate Report at 23; House Labor Report at 53; explaining the ADA. It states:

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.
>
> An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability. The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

Similarly, PWDCRA proscribes discrimination motivated by an employer's erroneous perception that an employee has a handicap. The focus of the Act is the basis of the employer's

conduct, that is, employer's belief or intent, and not employee's condition. The term "handicap" is now defined by MCL 37.1103(e); MSA 3.550(103)(e) to mean:

> 1 or more of the following:
>
> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic: ... substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
>
> (ii) A history of a determinable physical or mental characteristic described in subparagraph (i).
>
> (iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).

By Appellant's submitting the involuntary disability retirement application, it admitted it regarded Peden as totally incapacitated. This admission satisfies the element in 42 USC 12102(2)(C).

Peden further satisfies the test set forth in 42 USC 12102(2)(B). He had a record of an impairment of a major life's activity when he had his heart attack. He was substantially impaired from performing any of life's activities.

IV. Appellant Admittedly Terminated Peden's Employment On The Basis That It Regarded Peden As Totally Incapacitated Because Of Heart Disease. The Fact That Peden Was Not Totally Incapacitated Does Not Relieve Appellant Of Liability Under The ADA And MCHRA.

Prior to the termination of his employment, Peden was working in the Crime Analysis Unit. He received performance evaluations indicating he was exceptionally performing the duties of a crime analysis officer. Based solely on his heart disease and record of a heart attack, Appellant terminated Peden's employment claiming he was 'totally incapacitated.' Appellant's action was not based on any objective standard and Appellant has failed to come forward with any evidence as to what it claims Peden cannot do. Appellant's "action" in

terminating employment was based solely on Peden's heart disease and not Peden's ability to perform the duties of his position. This is clearly the type of discrimination both state and federal law prohibit.

In *Fussell v Georgia Ports Authority*, 906 F Supp 1561, 1566 (SD Ga 1995) the court focused on a clearly defined objective standard uniformly applied throughout its police department. "There is no disagreement that the firearm test, which is given over two days, is uniformly applied and administered to measure individual skills with a gun. All officers are tested under the same conditions." The Court noted at 1572 fn. 3, "Among other things, the firearm proficiency requirement has been long-standing and forms part of the GPA Police Department Rules and Regulations." At 1573 "Also, there is no evidence that the [firearm proficiency test was applied to him in a discriminatory fashion.

This is simply not the case before this Court. Peden was not given any tests. Peden's ability to perform the duties of his job was highly rated by his superiors. Peden's performance evaluations and personnel history of making forcible arrests was not examined. Appellant's own physician's statement that Peden "could perform any work" was ignored. Appellant has not identified one duty Peden was not able to perform. It unlawfully terminated Peden on the assumption that heart disease renders him unfit to be a police officer.

V. Peden Is Entitled To A Trial By Jury With Respect To The Essential Functions Of His Position And Whether He Could Perform Those Functions. The Trial Court Erroneously Deprived Peden Of His Right To A Jury Trial.

Peden has a right to a jury trial under the Michigan Handicappers' Civil Rights Act. *Barbour v. Department of Social Services*, 172 Mich App 275, 431 N.W.2d 482, (1988). Peden has a right to a jury trial under the ADA. *Hernandez v. City of Hartford*, 959 F Supp 125 (D.Conn.1997). There is substantial evidence:

(1) that Peden was performing his job;

(2) that he made forcible arrests, qualified with firearms, and drove motor vehicles notwithstanding his heart disease;

(3) that Appellant did not test Peden's ability to perform whatever duties it claims Peden cannot perform;

(4) that Appellant failed to identify one task it claimed Peden could not perform;

(5) that Appellant does not have a standards (except firearms) by which it determines whether employees can perform the tasks it deems essential;

(6) that Appellant does not evaluate employees who are deemed 'healthy' based on the 24 item task list;

(7) that Appellant failed to consider accommodations to Peden's heart disease;

(8) that by objective criteria Appellant does not consider its task list as essential;

(9) that Appellant continues to employ individuals with medical restrictions which prevent them from performing the items on the task list; and

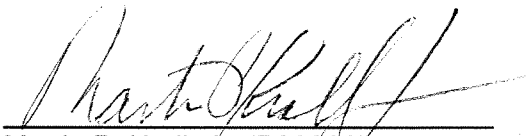
(10) that the tasks on Appellant's list are not regularly performed by employees in support staff positions, including the Peden's former position in Crime Analysis.

This case presents genuine issues of material fact that should be resolved by a jury. There is not one case allowing employers (including municipal employers and police departments) unlimited and unrestricted discretion to terminate employees with disabilities regardless of the economic benefit that can be gained. Neither Congress nor the Michigan Legislature created a statutory exemption for law enforcement. The criminal justice community must select and treat its employees must be in compliance with the ADA. This includes limitations on blanket exclusions and requires a selection process that deals with individuals on a case-by-case basis. The employer's decision must be based on objective standards grounded in the employee's inability to perform his particular job.

REQUESTED RELIEF

Peden requests this Court to affirm the Court of Appeals Opinion reversing the trial court's summary disposition in Defendant-Appellant's favor and remanding this case for trial instructing the trial court to focus on ability; not on disability.

October 7, 2003



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